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Sim Chu Hu v Kerk Han Meng & Ors

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-24NCC-138–03 OF 2020
ONG CHEE KWAN J
24 SEPTEMBER 2024

C *Companies and Corporations — Shares — Valuation — Buy-out order — Valuation report prepared by independent valuer pursuant to buy-out order to fix fair value for purchase of shares — Application by party for representation and to cross-examine independent valuer on valuation report — Whether independent valuer could be examined on valuation report*

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Pursuant to an oppression action, the plaintiff was granted a buy-out order ('buy-out order'). After the buy-out order, a further order was made where the procedure for the appointment of the independent valuer to determine the fair value for the plaintiff's shares was set out ('order dated 12 January 2023'). One Leonard Woo, of Deloitte Business Advisory Sdn Bhd ('Deloitte') was then appointed as the independent valuer pursuant to the buy-out order ('order dated 9 February 2023'). Subsequent to the order dated 9 February 2023, the parties were unable to agree on the terms of Deloitte's letter of appointment as the independent valuer until sometime on 8 November 2023 when the parties agreed to a consent order to a revised letter of appointment dated 27 February 2023 appointing Deloitte to proceed with the valuation report ('consent order'). On 30 May 2024, Deloitte completed its valuation report and submitted the same to the court and the parties ('Deloitte final report'). Thus, based on the buy-out order, the order dated 12 January 2023, the order dated 9 February 2023 and the consent order, the fourth defendant and or the first to third defendants ought to make the full payment of the fair value as determined by the Deloitte final report within three months thereto, ie, by 30 August 2024. Prior to the expiry of the three-month period to make full payment to the plaintiff, the fourth defendant filed encl 385 seeking to make representation and cross-examination of the Deloitte final report contending that it had an 'entrenched right' to challenge the Deloitte final report based on the consent order where the parties had expressly agreed to Deloitte's letter of appointment as revised 'without prejudice to the right of the parties to challenge the findings in the Deloitte's report ...'. The issue that arose for determination, inter alia, were whether in a buy-out order providing for the determination of the final fair value to be based on the valuation report of an independent valuer as opposed to the court, an application could be made to make representation and cross-examine the independent valuer on his valuation report.

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Held, dismissing the encl 385 with costs:

(1) In the present case, notwithstanding that the buy-out order had expressly provided for the final fair value to be determined by the independent valuer, the parties had, by consent order, expressly provided that the valuation report shall be without prejudice to the parties' right to challenge its findings. The aforesaid gave rise to the question as to the purpose for the parties' reservation of the right to challenge the findings of the Deloitte final report. The order dated 9 November 2022 and the procedure for valuation exercise, including the representation phase under the order dated 12 January 2023, remained unaltered. This meant that notwithstanding the parties' right to challenge the findings in the Deloitte final report, the court still had no jurisdiction to review and to vary its determination of the fair value of the plaintiff's shares. The application for representation and cross-examination of the independent valuer under encl 385 would serve no purpose at all (see paras 33–35).

(2) Neither the second nor the fourth defendants had demonstrated that Deloitte had erred in any material way in arriving at its conclusion on the fair value of the plaintiff's shares in the Deloitte final report. The fact that in the Deloitte final report, the contentions of the second and fourth defendants were not accepted, could not be a ground to an application to make representation and cross-examine the independent valuer. By filing encl 385, the fourth defendant was seeking to effectively stay the fourth defendant's obligation to make payment only after a further and prolonged process of representations and cross-examination of the independent valuer in respect of the Deloitte final report. Hence, the application was without any merits and an abuse of the court process. There must be a finality to the buy-out order and the second and the fourth defendants ought not to be allowed to subject the plaintiff to further oppressive conduct (see paras 36, 56 & 59–60).

[Bahasa Malaysia summary

Selaras dengan tindakan penindasan, plaintif telah diberikan perintah beli habis ('perintah beli habis'). Selepas perintah beli habis tersebut, perintah selanjutnya telah dibuat di mana prosedur pelantikan penilai bebas ditetapkan untuk menentukan nilai yang bersesuaian bagi saham plaintif ('perintah bertarikh 12 Januari 2023'). Leonard Woo dari Deloitte Business Advisory Sdn Bhd ('Deloitte') kemudiannya dilantik sebagai penilai bebas menurut perintah beli habis tersebut ('perintah bertarikh 9 Februari 2023'). Berikutan perintah bertarikh 9 Februari 2023, pihak-pihak tidak dapat bersetuju dengan terma surat pelantikan Deloitte sebagai penilai bebas sehingga pada 8 November 2023 apabila pihak-pihak bersetuju dengan perintah persetujuan kepada surat pelantikan yang disemak bertarikh 27 Februari 2023 yang melantik Deloitte untuk meneruskan laporan penilaian ('perintah persetujuan'). Pada 30 Mei 2024, Deloitte melengkapkan laporan penilaiannya dan menyerahkannya

kepada mahkamah dan pihak-pihak ('laporan akhir Deloitte'). Oleh itu, berdasarkan perintah beli habis, perintah bertarikh 12 Januari 2023, perintah bertarikh 9 Februari 2023 dan perintah persetujuan, defendan keempat dan atau defendan pertama hingga ketiga hendaklah membuat pembayaran penuh nilai yang bersesuaian seperti yang dinilai oleh laporan akhir Deloitte dalam tempoh tiga bulan, iaitu 30 Ogos 2024. Sebelum tamat tempoh tiga bulan untuk membuat pembayaran penuh kepada plaintif, defendan keempat memfailkan lamp. 385 untuk membuat respresentasi dan pemeriksaan balas laporan akhir Deloitte dan menghujahkan bahawa mereka mempunyai 'hak yang termaktub' untuk mencabar laporan akhir Deloitte berdasarkan perintah persetujuan di mana pihak-pihak telah bersetuju secara nyata kepada surat pelantikan Deloitte seperti yang disemak semula 'tanpa menjejaskan hak pihak-pihak untuk mencabar penemuan dalam laporan Deloitte …'. Isu yang timbul untuk penentuan, antara lain, adalah sama ada dalam perintah beli habis yang memperuntukkan penentuan nilai akhir yang bersesuaian berdasarkan laporan penilaian penilai bebas berbanding mahkamah, permohonan boleh dibuat untuk membuat representasi dan pemeriksaan balas penilai bebas mengenai laporan penilaiannya boleh dibuat.

Diputuskan, menolak lampiran 385 dengan kos:

(1) Dalam kes ini, walaupun perintah beli habis secara jelas memperuntukkan nilai akhir yang bersesuaian yang akan ditentukan oleh penilai bebas, pihak-pihak melalui perintah persetujuan dengan jelas mempersetujui bahawa laporan penilaian hendaklah tanpa menjejaskan hak pihak-pihak untuk mencabar dapatannya. Perkara tersebut menimbulkan persoalan mengenai tujuan hak pihak-pihak untuk mencabar penemuan laporan akhir Deloitte. Perintah bertarikh 9 November 2022 dan prosedur untuk pelaksanaan penilaian termasuk fasa respresentasi di bawah perintah bertarikh 12 Januari 2023 kekal tidak berubah. Hal ini bermakna walaupun pihak-pihak mempunyai hak untuk mencabar penemuan dalam laporan akhir Deloitte, mahkamah tidak mempunyai bidang kuasa untuk mengkaji dan mengubah hasil dapatannya terhadap nilai saham plaintif yang bersesuaian. Lampiran 385 tidak berguna sama sekali untuk permohonan representasi dan pemeriksaan balas penilai bebas (lihat perenggan 33–35).

(2) Defendan kedua atau keempat tidak menunjukkan kepada mahkamah bahawa Deloitte telah tersilap dalam sebarang cara yang material ketika mencapai kesimpulannya mengenai nilai saham plaintif yang bersesuaian dalam laporan akhir Deloitte. Fakta bahawa dalam laporan akhir Deloitte iaitu pertikaian defendan kedua dan keempat tidak digunapakai tidak boleh menjadi alasan kepada permohonan untuk respresentasi dan pemeriksaan balas penilai bebas. Dengan memfailkan lampiran 385 ini, defendan keempat berusaha untuk menangguhkan kewajipannya untuk membuat pembayaran hanya selepas proses representasu dan

pemeriksaan balas yang lebih lanjut dan berpanjangan terhadap penilai bebas berkenaan dengan laporan akhir Deloitte. Oleh itu, permohonan itu tidak mempunyai sebarang merit dan merupakan satu penyalahgunaan proses mahkamah. Perintah beli habis haruslah muktamad dan defendan kedua dan keempat tidak sepatutnya dibenarkan untuk membawa plaintif kepada tindakan penindasan yang berterusan (lihat perenggan 36, 56 & 59–60).]

Cases referred to

Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301, FC (distd)

Brendan Siva (with Aida Haryani) (Brendan Siva) for the plaintiff.
Kumarappan (with Raymond Tan) (Jeeva Partnership) for the first defendant.
Alvin Tang (with Kang Zhen Leong and Ponnie Govindasamy) (Alvin Tang Law Office) for the second defendant.
Siew Choon Jern (Douglas Yee) for the third defedant.
K Kirubakaran (with John Wong and Chong Kah Yee) (Shui Tai) for fourth defendant.

Ong Chee Kwan J:

INTRODUCTION

[1] When should the court permit an application by a party to cross-examine an independent valuer on his valuation report made pursuant to a buy-out order to fix the fair value for the purchase of the successful plaintiff's shares in a minority oppression action? Should there be a distinction between a buy-out order where the final fair value for the shares is to be fixed by the court and one where the final fair value is fixed by the appointed independent valuer? What must be demonstrated before the court will permit the independent valuer to be cross-examined on his valuation report?

[2] Enclosure 385 is an application filed by the fourth defendant to make representation and cross-examination of the valuation report prepared by Deloitte Business Advisory Sdn Bhd ('Deloitte') in respect of the plaintiff's 6,466,666 shares in the fourth defendant ('the plaintiff's shares') as at 24 December 2019 ('the valuation date').

[3] In this judgment, this court had to examine the questions raised above.

BACKGROUND FACTS

[4] On 9 November 2022, pursuant to an oppression action in the originating summons filed herein ('the OS'), this court granted the plaintiff,

inter alia, a buy-out order on the following terms ('the buy-out order'):

> 2. The Plaintiff do sell all his 6,466,666 shares in the 4th Defendant, and the 4th Defendant and/or alternatively the 1st Defendant and/or the 2nd Defendant and/or the 3rd Defendant do purchase and/or cause and procure the purchase of the same, at a fair value to be determined by an independent valuer appointed by the Court without any minority discount. The costs of the valuation to be borne by the 4th Defendant

[5] Subsequent to the buy-out order, a further order was made by this court on 12 January 2023 where the procedure for the appointment of the independent valuer to determine the fair value for the plaintiff's shares was set out ('order dated 12 January 2023'). The terms of the order dated 12 January 2023 are reproduced below:

> 1. That the Plaintiff nominate two professional valuers and the 1st to 4th Defendants each nominate one professional valuer for consideration of this Honourable Court for the purposes of appointment of an independent valuer, pursuant to paragraph 2 of the Order dated 9.11.2022, to determine the fair value of the 6,466,666 shares in the 4th Defendant without any minority discount;
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> 2. That the curriculum vitae and particulars of the said professional valuers be furnished to this Honourable Court within 7 days and the independent valuer be appointed by this Honourable Court within 14 days thereafter;
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> 3. That the date of the valuation of the said 6,466,666 shares in the 4th Defendant shall be as at 24.12.2019;
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> 4. The said independent valuer shall have unhindered access to all the books, records and financial information of the 4th Defendant wherever such may be kept and in whatever form at any time and from time to time, including with the auditors of the 4th Defendant;
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> 5. That the parties are entitled to appoint a professional adviser each who shall have the same right of unhindered access to all the books, records and financial information of the 4th Defendant wherever such may be kept and in whatever form at any time and from time to time, including with the auditors of the 4th Defendant which bear upon the value of the said 6,466,666 shares in the 4th Defendant;
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> 6. The said professional advisers shall have the right to make written representations to the independent valuer and/or this Honourable Court on matters which have a bearing on the fair value of the said 6,466,666 shares in the 4th Defendant;
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> 7. That the said independent valuer shall complete the valuation exercise and submit to this Honourable Court and to the parties a valuation report within 3 months from the date of this Order;
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> 8. That the said valuation report shall contain reasons for the valuation on the fair value of the said 6,466,666 shares in the 4th Defendant;

9. That the costs of the valuation be borne by the 4th Defendant; and

10. That the 4th Defendant and/or alternatively the 1st Defendant and/or the 2nd Defendant and/or the 3rd Defendant do make full payment of the said fair value of the said 6,466,666 shares in the 4th Defendant to the Plaintiff within 3 months.

[6] As can be seen from the order dated 12 January 2023, the parties, including the second and fourth defendants, were entitled to appoint their respective professional advisers to make representations to the independent valuer on matters which may have a bearing on the fair value of the plaintiff's shares. Further, upon the determination of the fair value by the independent valuer, the fourth defendant and or the first to the third defendants are to make full payment to the plaintiff for the plaintiff's shares.

[7] On 9 February 2023, this court ordered that one Leonard Woo of Deloitte be appointed as the independent valuer pursuant to the buy-out order to determine the fair value of the plaintiff's shares without any minority discount ('order dated 9 February 2023') The independent valuer was to complete his valuation report within three months from the date of the order dated 9 February 2023.

[8] However, subsequent to the order dated 9 February 2023, the parties were unable to agree on the terms of Deloitte's letter of appointment as the independent valuer until sometime on 8 November 2023 when the parties agreed to a consent order to a revised letter of appointment dated 27 February 2023 appointing Leonard Woo of Deloitte to proceed with the valuation report ('the consent order'). The terms of the consent order expressly stipulates that '… it is without prejudice to the right of the parties to challenge the findings in the Deloitte's report …'.

[9] It was also agreed by the consent order that Deloitte was to be given an extension of time to complete its valuation report.

[10] On 30 May 2024, Deloitte completed its valuation report and submitted the same to the Court and the parties ('Deloitte Final Report').

[11] Thus, based on the buy-out order, the order dated 12 January 2023, the order dated 9 February 2023 and the consent order, the fourth defendant and or the first to third defendants ought to make the full payment of the fair value as determined by the Deloitte Final Report within three months thereto, ie by 30August 2024.

[12] On 5 July 2024, prior to the expiry of the three-month period to make

full payment to the plaintiff, the fourth defendant filed encl 385 seeking to make representation and cross-examination of the Deloitte final report. The application was supported by the second defendant.

[13] The fourth defendant contended that it has an 'entrenched right' to challenge the Deloitte final report based on the consent order where the parties had expressly agreed to Deloitte's letter of appointment as revised 'without prejudice to the right of the parties to challenge the findings in the Deloitte's report ...'.

[14] By this, the fourth defendant submitted that it has a right to cross-examine Deloitte in respect of any findings stated in the Deloitte final report without any need to demonstrate that the findings were either unreasonably high or low in the circumstances and or that the findings are either inconsistent with any acceptable accounting standards or one where any reasonable valuer would have come to a different conclusion.

[15] On the other hand, the second defendant sought to support the application by the fourth defendant on a more principled and narrow grounds, namely that:

(a) there is a substantial difference between the valuation in Deloitte final report and the previous valuation 'carried out' or agreed by the parties, being an increase of RM6m (from RM15m to RM21m) for the plaintiff's shares;

(b) when conducting its valuation, Deloitte appears to have:

(i) discounted or ignored valuation approaches which had arrived at a lower valuation and instead preferred the valuation approaches which culminated in a high valuation of the fourth defendant's equity. In this regard, it was contended that the cost approach which had delivered a value that approximates the previous valuation by the parties ought to have been adopted by Deloitte;

(ii) applied an erroneous principal assumption when it included the recoverability of the doubtful debts of RM14,841,000 in relation to 21 sales made by the fourth defendant to one Savino Del bene ('Savino') in South Africa (collectively referred as 'the Savino transaction') in its computation of the fair value of the fourth defendant's shares. According to the second defendant, notwithstanding that the audited financial statements for the FY 2020 had provided only the sum of RM1.5m as provisional of doubtful debt in respect of the Savino transaction, the parties had known at the material times that the entire debt of RM16m for the Savino transaction was not recoverable. The second defendant

contended that Deloitte's assumption of the recoverability of the said RM14,841,000 was erroneous and this in turn had affected the veracity and accuracy of Deloitte final report.

[16] The plaintiff, unsurprisingly, contested the application under encl 385. More specifically, learned counsel for the plaintiff contended that:

(a) there is no legal basis for the application to make representation and cross-examine the Deloitte final report given that the fair value of the plaintiff's Shares is determined by the independent valuer and not the court as provided under the buy-out order and the order dated 12 January 2023;

(b) following from the aforesaid, any application to make representation and cross-examine the Deloitte final report would serve no purpose; and

(c) there is also no evidence of any conflict or error in the Deloitte final report to warrant the application.

LEGAL ISSUES

[17] Arising from the above, the following legal issues had to be considered by this court:

(a) whether in a buy-out order providing for the determination of the final fair value to be based on the valuation report of an independent valuer as opposed to the court, an application can be made to make representation and cross-examine the independent valuer on his valuation report;

(b) whether in a buy-out order providing for the determination of the final fair value to be based on the valuation report of an independent valuer, an application to make representation and cross-examine the independent valuer on its valuation report can be made where the parties had by consent reserved their rights to challenge the findings of the independent valuer; and

(c) whether the objections raised by the second and fourth defendants are sufficient to merit an order to make representation and cross-examine the independent valuer on its valuation report, in other words, what is the test that must be satisfied for such an application to succeed?

COURT'S CONSIDERATIONS

[18] At the outset, it must be stated that the fourth defendant's application in encl 385 to make representation and to cross-examine the Deloitte final report must be subject to the terms of the buy-out order, the order dated 9 November 2022, the order dated 12 January 2023 and the consent order.

[19] The fourth defendant had relied specifically on the consent order contending that by the parties having expressly agreed that the Deloitte final report shall be subject to the rights of the parties to challenge its findings, the plaintiff could no longer object to the fourth defendant's right to make the application under encl 385.

[20] In further support of its application, reference was made by learned counsel for the fourth defendant to the Federal Court's judgment in *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301 ('Zen Courts').

[21] In *Zen Courts*, the Federal Court was dealing with an application under the 'liberty to apply' clause and in reliance thereto, granted to the applicant, its application to make representations on the valuation report (which was also made pursuant to a buy-out order) by way of cross-examination of the valuation expert.

[22] Suriyadi FCJ of the Federal Court, in allowing the application to make representations on the valuation report by way of cross-examination of the expert, held at para [23] of the judgment as follows:

> [23] Permitting the appellant to make representations on the valuation report by cross-examination of the valuation experts, by no account would vary the buy-out order. *In fact, it does make good commercial sense that parties be entitled to challenge any valuations, if it were to be unreasonably high or low in the circumstances of the case. After having been appraised of the evidence before it, that is after ensuring that the valuation has not taken into account irrelevant considerations, or omitted relevant considerations that fundamentally affect the final value, the High Court may determine the value of the shares.* It may thereafter make the necessary order, namely to confirm, vary or set aside the valuation report, in consonant with the buy-out order. Sub-order (v) which states that 'the court will determine the final value of the shares and the terms of the buy-out order', is not there for decoration but intended for a useful purpose. (Emphasis added.)

[23] From the aforesaid passage, one can immediately appreciate that in *Zen Courts*, the Federal Court was dealing with a buy-out order which expressly stipulated that *the court* 'will determine the final value of the shares and the terms of the buy-out order' after the valuation report is issued. In other words, the final value of the shares was to be decided by the court and not the valuation experts.

[24] What the aforesaid means is that the determination as to what is considered as a 'fair value' is ultimately to be fixed by the court after being informed by the expert's valuation. In other words, the fair value although determined by the court appointed expert, it is for the court to finally fixed the

fair value to be paid. The court is not bound to adopt the expert's valuation at all.

[25] Thus, in a buy-out order where it is the court who is to fix the final fair value, the court has the jurisdiction and powers to either enhance or discount or even adopt the fair value as determined by the appointed independent valuer derived based on strict accounting principles.

[26] In such a case, the Federal Court in *Zen Courts* held that where there is evidence that the valuation report is found to be 'unreasonably high or low in the circumstances of the case' or that that 'the valuation has taken into account irrelevant considerations, or omitted relevant considerations that fundamentally affect the final value', then it makes good commercial sense for parties to be permitted to challenge the valuation report so that the court may be appraised of all the facts before determining the final value for the buy-out order.

[27] However, in the present case, unlike the *Zen Courts*, the buy-out order *vide* the order dated 9 November 2022 provides that the fair value of the plaintiff's shares shall be determined by an independent valuer appointed by the court and further that the fourth defendant shall make the full payment to the plaintiff the fair value as determined by the independent valuer within three months from the issuance of the valuation report. In other words, it is not the court who makes the determination of the final fair value but the independent valuer.

[28] In this regard, it is of significance that the order dated 12 January 2023 had provided that parties are entitled to appoint their respective professional advisers who shall have the right to make written representations to the independent valuer on matters which may have a bearing on the value of the plaintiff's shares during the course of the valuation exercise. What this means is that opportunities were expressly provided under the buy-out order for the defendants to present their views to the independent valuer on the issues which the defendants would like the independent valuer to take into account before the determination of the fair value for the shares. This process, which for convenience, I shall refer to as the the representation phase of the exercise, is to avoid the parties complaining that the independent valuer had omitted relevant facts when deriving at the fair value for the plaintiff's shares.

[29] In pursuit of the application under encl 385, the second defendant contended that there is a substantial difference between the valuation of the fair value in the Deloitte final report and the previous 'agreed valuation' of RM45m for the fourth defendant's shares by the parties at the trial of the oppression action. According to the second defendant, the fair value of between RM60m

and RM69m ascribed by Deloitte for the fourth defendant's shares would give rise to an increase of about RM6m from the parties' valuation of RM15m for the plaintiff's shares based on the value of RM45m that was 'agreed' at the trial in the oppression action as the fair value of the fourth defendant's shares.

[30] It was contended that when conducting its valuation, Deloitte appears to have:

(a) discounted or ignored valuation approaches that had arrived at a lower valuation and instead preferred the valuation approaches which culminated in a high valuation of the fourth defendant's equity. It was contended that the valuation based on the cost approach which would deliver a value that better approximates the previous valuation by the parties ought to have been adopted; and

(b) erroneously treated the debt due to the fourth defendant under the Savino transaction in the sum of RM14,841,000 as recoverable even though the same had been placed as doubtful debts in the fourth defendant's financial statements for the FY2020. It is said that this has affected the veracity and accuracy of Deloitte final report.

[31] The aforesaid two issues were raised as justifications for cross-examination of the Deloitte final report.

[32] In my judgment, where the buy-out order provides for the final fair value to be fixed by an independent valuer and not the court, there is really little to no room for any party to apply to cross-examine the independent valuer on its report. This is because the cross-examination will serve no purpose at all since the buy-out order has effectively bound the parties to the fair value as determined by the independent valuer, however erroneous the valuation may turn out to be from the cross-examination. The court has simply no jurisdiction to review and to vary the conclusion reached by the valuation report. One such rare exception would be where it is determined that there was mala fide in the preparation of the valuation report where in such a case, the entire valuation report could be set aside.

[33] In the present case however, notwithstanding that the buy-out order had expressly provided for the final fair value to be determined by the independent valuer, the parties had by the consent order expressly provided that the valuation report shall be without prejudice to the parties' right to challenge its findings.

[34] The aforesaid gives rise to the question as to the purpose for the parties' reservation of the right to challenge the findings of the Deloitte final report. The buy-out order made on 9 November 2022 and the procedure for valuation

exercise including the Representation Phase under the order dated 12 January 2023 remained *unaltered*. This means that notwithstanding the parties' right to challenge the findings in Deloitte final report, the court still has no jurisdiction to review and to vary its determination of the fair value of the plaintiff's shares.

[35] Accordingly, I would agree with learned counsel for the plaintiff that the application for representation and cross-examination of the independent valuer under encl 385 would serve no purpose at all.

[36] In any case, it is also my judgment that neither the second nor the fourth defendants has demonstrated to this court that Deloitte has erred in any material way in arriving at its conclusion on the fair value of the plaintiff's shares in the Deloitte final report.

[37] Both the issues that I have set out in paragraph 30 above which underpinned the premise of the application under encl 385 were in fact raised by the second and fourth defendants to Deloitte during the representation phase of the valuation exercise.

[38] In assessing the fair value of the plaintiff's shares for the purpose of the buy-out order, Deloitte had computed the fair value based on four different approaches, namely, the market approach guideline public companies method ('GPC method'), market approach guideline transaction method ('GT method'), the income approach (or the discounted cash flow method) ('DCF method') and the cost approach ('cost method').

[39] In respect of the cost method, Deloitte had informed the parties during the representation phase that in its opinion, the cost method 'is considered and is likely to be used as a cross-check given that it does not consider the potential value of future earnings and any potential intangible assets of CJ Polymers'. In fact, in Deloitte final report, it opined that:

> Given that the cost approach does not consider the business' prospects, potential value of future earnings as well as any potential intangible assets of the business, the value derived based on the costs approach is unlikely to be representative of the fair value of CJ Polymers. *As such, the cost approach has not been adopted as part of the value conclusion, but is disclosed merely for informational purposes.* (Emphasis added.)

[40] In other words, Deloitte had concluded that the cost method was not suitable for the valuation of the fourth defendant's shares to determine its fair value since the fourth defendant is a going concern.

[41] On the Savino transaction, the second and fourth defendants had also raised to Deloitte on the loss of RM16m during the representation phase. In

A particular, it was contended to Deloitte that:

> ... Savino transaction was created without the knowledge of all shareholders and hence, suffered losses of approximately RM16 million.
>
> Based on the above, the non-recoverability of the total RM16 million relating to Savino or Dubious Transactions are known before the Valuation Date, though the accounting entry on the full provision for doubtful debts on Savino 21 transactions was only entered into the accounting system subsequent to the Valuation Date.
>
> Hence provision of doubtful debts should be considered in the valuation.

[42] By the aforesaid, what was contended to Deloitte was that the valuation of the fourth defendant's shares should be based on a full provision of RM16m as doubtful debt notwithstanding that the said provision was only entered in the company's accounts *after* the valuation date, agreed to be as at 24 December 2019.

[43] With regards to the treatment of the debt arising from the Savino transaction where for the FY 2019, only RM1.5m was provided as doubtful debt, Deloitte had explained to the second and fourth defendants during the Representation Phase that the reversal of the provision of doubtful debt for the sum of RM14,841,000 under the Savino transaction represents a *post*-valuation Event and ought not to be taken into account. More specifically, Deloitte had explained that:

> The IVS requires that a valuation is time-specific and reflects the market state and circumstances as of the valuation date, not those at other date. *Therefore consistent with IVS, the provisions which were made subsequent to the Valuation Date mandated by the High Court should not be considered.* (Emphasis added.)

[44] By 'IVS', Deloitte was referring to the International Valuation Standards effective 31 January 2020 and in this regard, there is no suggestion that Deloitte was wrong to rely on this standard. The IVS issued by The International Valuation Standards Council ('IVSC') are standards for undertaking valuation assignments using generally recognised concepts and principles that promote transparency and consistency in valuation practice. The IVSC is an independent organisation which promotes leading practice approaches for the conduct and competency of professional valuers.

[45] This court had specified in the buy-out order that the fair price of the plaintiff's shares shall be computed based on the valuation as at 24 December 2019 as the valuation date. In fact, I was reminded by learned counsel for the plaintiff that it was counsel for the fourth defendant who had agreed to the said date as the valuation date to allay the plaintiff's concerns that events subsequent to his termination as the General Manager of the fourth defendant would adversely impact the valuation of his shares.

[46] The valuation date as at 24 December 2019 in this case means that events subsequent to this date cannot be considered in determining the valuation of the fourth defendant's shares. This is based on the IVS. As the fourth defendant had made provision for the debt of RM14,810,000 under the Savino transaction as doubtful debt only *after* 24 December 2019, Deloitte had rightfully not considered the same in accordance with the IVS in arriving at its valuation of the fair value of the plaintiff's shares in the Deloitte final report.

[47] Hence, in the Deloitte final report, it is expressly provided that one of the principal assumptions made for the valuation would be that in respect of the Savino transaction, the treatment of the delinquent debts for the purpose of the valuation would be based on 'the circumstances and information available as of the Valuation Date'. More specifically, the presumption dealing with the provision of doubtful debt in respect of the Savino transaction was stated in this manner:

> The 64 transactions with Savino Del bene ('Savino')('Savino transactions') were incurred in the ordinary course of business and the delinquent debts owing from Savino in relation to 21 of the sale transactions which had not been paid is recoverable based on the circumstances and information available as of the Valuation Date.

[48] To determine the maintainable EBITDA for the fourth defendant, in Deloitte final report, it is expressly stated that it had normalised the historical EBITDA for the FY 2018, FY 2019 and 9MFY2020, adjusting for, inter alia:

> Provision for doubtful debts in relation to the outstanding receivables balance from Savino Del Bene (Pty) Ltd ('Savino') – Based on Management's submission and the FY 2020 audited financial statements, the actual provision in FY 2020 was only RM1.5 mil. We also noted from the management's submission that the sales transaction to which the provision relates occurred in FY 2019. Based on the above, we have adjusted the provision of c. RM16.3 mil to be nil in 9MFY 2020 and added a provision of RM1.5 mil in 2019 i.e. the year in which the sale was incurred.

[49] By the aforesaid, Deloitte had made it clear that in deriving the three-year average normalised EBITDA, it had computed the normalised profits based on the 12-month results of FY 2018 and FY 2019 and the last trailing 12 month ('LTM') result as at the valuation date derived based on the results of 9MFY 2020 and three-month apportioned results of FY 2019. Again, there is no challenge that Deloitte was wrong to adopt this approach.

[50] Based on, inter alia, the aforesaid, the Deloitte final report arrived at its conclusion at section 11 on the fair value and specifically stated in section 11.2 thereto that the 'fair value of the 6,466,666 shares in CJ Polymer (which approximates a 32.3% equity interest based on total issued share capital of

20,000,000 shares) without minority discount is estimated to be in the range of c. RM19.4 mil to c. RM22.5 mil'.

[51] The entire dection 11 setting out Deloitte's conclusion of the fair value of the fourth defendant's shares and the corresponding fair value for the plaintiff's shares are set out below:

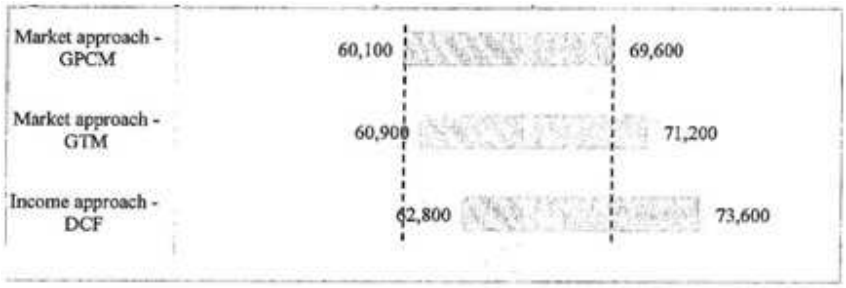
Deloitte.

11. Conclusion

11.1. Valuation results

11.1.1. The estimated fair value of a 100% equity interest in Cl Polymers based on the valuation approaches adopted are illustrated as follows:

Figure 5: Summary of valuation results (in RM thousands)



11.2. Valuation conclusion

11.2.1. We have assessed the fair value of a 100% equity interest in CJ Polymers as at the Valuation Date to be in the range of c. RM60.1 mil to c. RM69.6 mil.

Table 14: Valuation conclusion

RM thousands	Low	High
Market approach — GPCM	60,100	69,600
Market approach — GTM	60,900	71,200
Income approach — DCF	62,800	73,600
Indicative equity value of 100% interest	60,100	69,600
Concluded equity value of 6,466,666 shares (c. 32.3% interest) without any minority discount	19,400	22,500

11.2.2. In connection with the High Court Orders, the fair value of the 6,466,666 shares in CJ Polymers (which approximates a 32.3% equity interest based on total issued share capital of 20,000,000 shares) without any minority discount is estimated to be in the range of c. RM19.4 mil to c. RM22.5 mil.

[52] To be clear, it is not the second and fourth defendants' case that the fair value of between RM60.1m and RM69.6m that Deloitte had determined for

the fourth defendant's shares is one that no reasonable and competent valuer applying the IVS would have concluded. Instead what they wish to do is to have the opportunity to cross-examine Deloitte on its decision in refusing to treat the entire debt of RM16m for the 21 sales relating to the Savino transaction as irrecoverable.

[53] They also wish to cross-examine Deloitte on its decision not to consider the valuation based on the Cost Method. As alluded to above, during the trial of the plaintiff's oppression action, the parties had agreed to an estimated figure of RM45m as the fair value of the fourth defendant's shares. According to the second and fourth defendants, the Cost Method which Deloitte had computed to give a value of RM47.7m as the fair value of the fourth defendant's shares would reflect a more accurate figure as it is nearer to the aforesaid agreed fair value.

[54] Plainly, the grievances above have nothing to do with any errors relating to the application by Deloitte of the relevant accounting and valuation principles based on internationally accepted standards, in this case, the IVS. On the contrary, the dis-satisfactions in the Deloitte final report pertained to the exercise of discretion by Deloitte on its preferred method of valuation and its strict application of the accounting and valuation principles in relation to *post*-valuation date events.

[55] Both the second and fourth defendants had availed themselves of the opportunities during the representation phase to highlight their respective contentions to Deloitte on matters that in their views ought to be considered when deriving the fair value of the fourth defendant's shares. These included the matters above which form the basis for the application in encl 385 herein.

[56] The fact that in the Deloitte final report, the contentions of the second and fourth defendants were not accepted, to my mind, cannot be a ground to an application to make representation and cross-examine the independent valuer.

[57] The plaintiff had successfully obtained the buy-out order on 9 November 2022. More than 18 months have passed since the buy-out order and the plaintiff still remains a shareholder of the fourth defendant. In the meantime, the fourth defendant and the other existing shareholders are embroiled in new disputes and litigations among themselves. There are now new directors in control of the company.

[58] The terms of the order dated 12 January 2023 had provided for the appointment of the independent valuer and for payment to be made to the plaintiff within three months of delivery of valuation report. Deloitte's final

report. This was protracted because of the disputes between the parties on the terms of Deloitte's letter of appointment which was only resolved vide the consent order on 8 November 2023. The Deloitte final report was also delayed because more time was given to the parties to make their respective representations prior to the completion of the same. The Deloitte final report was finally delivered on 30 May 2024.

[59] Notwithstanding the aforesaid, by filing encl 385, the fourth defendant is seeking to effectively stay the fourth defendant's obligation to make payment only after a further and prolonged process of representations and cross-examination of the independent valuer in respect of the Deloitte final report.

[60] To my mind, the filing of encl 385 is nothing more than an attempt to further delay the payment to be made to the plaintiff under the buy-out order. The application is without any merits and an abuse of the court process. There must be a finality to the buy-out order and the second and the fourth defendants ought not to be allowed to subject the plaintiff to further oppressive conduct.

CONCLUSION

[61] For the reasons set out above, the fourth defendant's application in encl 385 is dismissed with costs fixed at RM10,000 and RM5,000 to be paid to the plaintiff and the first defendant respectively subject to the usual payment of the allocator.

Application dismissed.

Reported by K Selvaraju